

ESTATE OF JOHN CHARLIE

IBIA 92-205

Decided October 20, 1993

Appeal from an order on reopening issued by Administrative Law Judge Patricia McDonald in Indian Probate IP AL 9L 92 (Reopening), IP GA 34G 84.

Reversed.

1. Board of Indian Appeals: Jurisdiction--Indian Probate:
Administrative Law Judge: Authority--Indians: Contracts:
Generally--Indians: Financial Matters: Individual Indian Money
Accounts

When a claim for "finder's fees" arises within the context of a probate proceeding, seeks recovery from the Individual Indian Money account of an heir or devisee, and is based on a contract that requires Departmental approval but has not been approved, the Administrative Law Judge is an "authorized representative" of the Secretary of the Interior within the meaning of 25 CFR 115.9 for the purpose of considering whether the contract should be approved.

APPEARANCES: Eric Weaver, Esq., Albany, California, for appellant; David Fleming Taylor, Esq., Eighty-Four, Pennsylvania, for Alice Heyman; Beth Caldwell, pro se.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Richard Miller seeks review of a June 10, 1992, order on reopening issued by Administrative Law Judge Patricia McDonald in the estate of John Charlie (decendent). For the reasons discussed below, the Board of Indian Appeals (Board) reverses that decision.

Background

Decendent, Navajo Allottee No. 059306, C#11036, was born on December 23, 1915, and died intestate on June 2, 1983. Judge McDonald held hearings to probate decendent's trust estate on August 7, 1984, and November 22, 1985. Based upon evidence presented at those hearings, on February 20, 1986, Judge McDonald issued an order in which she determined that decendent's heirs were

his three surviving daughters, Jessie Charley Jacquez, Alice Charlie, and Isabel Charlie, and a purported grandson, Augustine Boyd Teswood. 1/ At the time of the hearing, the whereabouts of Alice and Isabel were unknown. Testimony indicated that they had been taken by unknown missionaries in or about 1949, and that one of them may have died.

No appeal was taken from the order determining heirs. 2/ Since the entry of that order, income from Alice's and Isabel's shares of the estate has been deposited into Individual Indian Money (IIM) accounts maintained for them at the Eastern Navajo Agency, Bureau of Indian Affairs (BIA).

Jessie subsequently retained an attorney who sought the services of a private investigator to attempt to find proof that Alice and/or Isabel had either been adopted or were deceased. Such a finding could have resulted in Alice and/or Isabel's interests passing to Jessie. The first private investigator was unsuccessful in finding any information relating to the women. A second investigator, present appellant, located Alice Heyman and Beth Caldwell, who alleged they were decedent's missing daughters. 3/

Judge McDonald reopened decedent's estate, and held a hearing on November 14 and 15, 1991. Based on evidence presented at the hearing, on June 10, 1992, Judge McDonald found that Alice Heyman was Alice Charlie, and Beth Caldwell was Isabel Charlie; the girls had been raised by Victor and Doris Starrett, who were Seventh-Day Adventist missionaries; Isabel's name had been changed to Beth by the Starretts; and neither Alice nor Beth had been adopted by the Starretts or any other person(s). These determinations have not been appealed.

In the same order, Judge McDonald considered two contingency fee contracts entered into between appellant and Alice, and appellant and Beth. The contracts provided that Alice and Beth would each pay appellant a "finder's fee" of 15 percent of the amount they recovered from decedent's

1/ Augustine Boyd Teswood is the son of Bessie Charlie Teswood, a predeceased purported daughter of appellant. Bessie's paternity was disputed, and a compromise settlement was entered into and approved by Judge McDonald under which Augustine took half of the interest to which he would have been entitled if he were found to be decedent's heir.

2/ Judge McDonald noted in her June 10, 1992, order that Alice and Isabel had technically inherited property from their mother, their father, and their mother through their father. However, in order to simplify the procedural aspects of this case, the Judge referred to all property as passing to them from their father. The Board will do the same. This usage does not constitute a factual finding as to the source of the property.

3/ Appellant's initial efforts were also unsuccessful. After appellant reported his lack of success to Jessie's attorney, the attorney told him to conclude his search and send a final report. Appellant continued his search despite these instructions, and ultimately located Alice, who knew where Beth was.

estate. 4/ The judge declined to order specific performance of the contracts, as appellant requested, but instead awarded appellant \$5,840.04 on a quantum meruit basis.

Appellant, who had anticipated receiving \$69,600, appealed from the denial of his full claim. Briefs were filed by appellant and Alice.

Jurisdiction

Normally claims against a decedent's estate filed in Departmental probate proceedings relate to alleged debts incurred by, or on behalf of, the decedent. The primary exception is attorney fees for representation of heirs and/or devisees during the probate proceeding. These fees are specifically addressed in 43 CFR 4.281, which provides that "[a]t the administrative law judge's discretion [attorney] fees may be chargeable against the interests of the party thus represented, or where appropriate, they may be taxed as a cost of administration" of the estate.

Here, however, appellant's claim seeks recovery for non-legal services rendered to Alice and Beth. This claim would normally not be considered in a probate proceeding.

In addition, the funds from which appellant seeks recovery derive from leases of trust real property. Under 25 U.S.C. § 410 (1988), "[n]o money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period * * * except with the approval and consent of the Secretary of the Interior." See also In the Matter of the Guardianship of Prieto, 52 Cal.Rptr. 80, 84, 243 C.A.2d 79 (Cal. Dist. Ct. App. 1966). Appellant's contracts have not been approved.

Regulations governing disbursements from IIM accounts are found in 25 CFR Part 115. Section 115.9 provides in part that "funds obligated under contractual arrangements approved in advance by the Secretary or his authorized representative shall be disbursed only in accordance with the agreements * * *."

4/ The order indicates that appellant's contracts could arguably be interpreted as applying to the value of all realty and personalty inherited by Alice and Beth, and to personalty accruing after the contracts were signed. The Judge, however, interpreted the contracts as applying only to personalty held by BIA in IIM accounts for Alice and Beth at the time the contracts were signed. Appellant has not contested this interpretation of the contracts.

5/ When Beth did not file a brief, appellant made a settlement offer to her. Beth filed a copy of the offer with the Board, and stated that she was happy with the Judge's decision and was not interested in accepting appellant's offer.

Because neither the probate regulations in 43 CFR Part 4, Subpart D, nor the IIM regulations in 25 CFR Part 115, provide that an Administrative Law Judge conducting a probate proceeding is an "authorized representative" of the Secretary for the purpose of approving a contract attempting to obligate funds in the IIM account of an heir or devisee, by order dated July 19, 1993, the Board requested briefing on jurisdiction from the Assistant Secretary - Indian Affairs. The Assistant Secretary replied:

It is the position of the Assistant Secretary - Indian Affairs that when a claim for "finder's fees" arises within the context of a probate case, but which, upon determination by the presiding Administrative Law Judge, constitutes a claim against the IIM accounts of the heirs pursuant to 25 CFR Part 115, its consideration by the presiding judge comports with and fulfills the due process requirements, including the hearing provisions set forth in 25 CFR Part 115. We agree with the Board that such procedure also "provides for a decision by an objective and informed decisionmaker, and represents a reasonable method for conserving both judicial and administrative resources." When acting within the context of a probate case in such circumstances, we believe that the Administrative Law Judge is an authorized representative of the Secretary of the Interior for purposes of 25 CFR 115.9.

Both Alice and appellant filed responses, agreeing with the Assistant Secretary's position. Appellant, however, noted that the authority "is not unfettered and the approval of such contracts is not left to the personal whim of the Administrative Law Judge."

[1] Based upon the Assistant Secretary's position statement, the Board holds that, when a claim for "finder's fees" arises within the context of a probate proceeding, seeks recovery from the IIM account of an heir or devisee, and is based on a contract that requires Departmental approval but has not been approved, the Administrative Law Judge is an "authorized representative" of the Secretary within the meaning of 25 CFR 115.9 for the purpose of considering whether the contract should be approved. Although it is preferable that all contracts be approved when they are executed, this is not required, and "finder's fee" contracts may be approved retroactively prior to disbursement. Cf. In re Attorney Fees Request of Gosta E. Dagg, 12 IBIA 132, 91 I.D. 39 (1984).

Discussion and Conclusions

Appellant seeks review of the Judge's failure to order specific performance of the two contracts. 6/ Although both appellant and the Judge

6/ Although Alice and Beth each also executed powers of attorney to appellant, authorizing him to assist them in collecting the property being held for them, these documents are not at issue except as indicated in the text below.

addressed appellant's claim in terms of specific performance of a contract, in the Indian law context and under the scenario presented by the facts of this case, the claim is more properly characterized as one requesting the approval of the contracts under 25 U.S.C. § 410 and 25 CFR 115.9. The law of specific performance assumes that there is a contract which one party has refused to honor, and which a court sitting in equity may or may not enforce according to its terms depending upon the situation between the parties. However, the contracts at issue here have no force or effect and grant no rights to appellant, as against funds held in trust by the United States, without the approval required by statute. See Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, 24 IBIA 169, 179 (1993), and cases cited therein. Furthermore, in determining whether the contracts should be approved, the Department is required by statute, regulation, and at least a century of United States Supreme Court decisions to act as a trustee for Alice and Beth.

In Naegele Outdoor Advertising, the Board held that consideration of contracts that required Departmental approval, but had not been approved, was governed by Federal law. It also held that the construction of contracts approved by the Secretary on behalf of an Indian individual or tribe is a question of Federal law; Federal contract law is governed by principles of general contract law; and in the absence of relevant Federal law, state law serves as a source for the general law of contracts "to the extent that it does not conflict with the Federal interest in developing and protecting the use of Indian resources." 24 IBIA at 177, quoting United States v. Humboldt Fir, Inc., 426 F. Supp. 292, 297 (N.D. Calif. 1977), aff'd mem., 625 F.2d 330 (9th Cir. 1980).

In considering whether the contracts at issue here should be approved, the Board finds that the general law of specific performance can offer guidance. If a court would refuse to order specific performance of a contract, it would unquestionably be reasonable for the Department, which is held to a higher fiduciary standard, to refuse to approve that contract.

The guiding principle of the general law of specific performance is that specific performance is an equitable remedy: "A decree for specific performance is not granted as a matter of abstract right, but in every instance the application for such relief is addressed to the sound, legal discretion of the court." Interior Securities Co. v. Campbell, 55 Mont. 459, 178 P. 582, 585 (1919). See also, e.g., Schlegel v. Moorhead, 170 Mont. 391, 553 P. 2d. 1009 (1976); Hutchins v. Honeycutt, 286 N.C. 314, 210 S.E.2d 254 (1974).

Judge McDonald cited Hutchins as indicative of the law of specific performance. Although appellant has disputed the Judge's application of that law, he has not objected to her statement of it. The court in Hutchins stated:

Generally speaking, however, specific performance of a contract is decreed only when it is equitable to do so. Accordingly, a plaintiff cannot obtain specific performance when a contract is

unfairly procured by overreaching on plaintiff's part, or is induced or procured by means of oppression, extortion, threats, or illegal promises on his part. See 71 Am.Jur.2d, Specific Performance, § 45 (1973). "These matters need not be of such character as would justify a court of equity in rescinding the contract or a court of law in refusing relief. There is a difference between that degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract and that which will induce a court to withhold its aid. Relief may be denied upon the ground that the contract is harsh, unjust, or oppressive, regardless of any actual fraud, and regardless of the fact that the contract is valid."

71 Am.Jur.2d, Specific Performance, § 52 (1973), Knott v. Cutler, 224 N.C. 427, 31 S.E.2d 359 (1944). Even so, it is well settled that when "the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award a judgment of damages for its breach." 4 Pomeroy, Equity Jurisprudence § 1404 (5th ed., Symons 1941), Rudisill v. Whitener, 146 N.C. 403, 59 S.E. 995 (1907). Thus, specific performance does not depend upon an unbridled discretion that varies with the length of the chancellor's foot but is granted or withheld according to the equities that flow from a just consideration of all the facts and circumstances of the particular case. Byrd v. Freeman, 252 N.C. 724, 114 S.E.2d 715 (1960); 71 Am.Jur.2d, Specific Performance, § 6 (1973).

(210 S.E.2d at 257).

There is no dispute here that neither Alice nor Beth would have known about their substantial inheritances but for appellant's efforts in locating them. There is also no dispute that appellant conducted his investigation professionally and skillfully. Z/

The Judge examined the relationships between appellant and Jessie, and appellant and Alice and Beth before concluding that appellant had

Z/ At pages 10-11 of her June 10, 1992, order, Judge McDonald stated:

"Considering [appellant's] submissions detailing his efforts it can be seen that this was a difficult search. He had little information to start, and did not know that Beth Caldwell's first name had been changed; in addition, it was believed that one of the girls had probably died. He accessed many computerized data bases personally and through other investigators. One measure of the difficulty of the search is the great number of hours necessary to locate Mrs. Heyman. Of course, once she was located, it was a matter of minutes to locate Mrs. Caldwell. While locating a person is not a novel undertaking for an investigator, it can involve specialized knowledge and access to records, and skill and creativity in using the resources available, all demonstrated by [appellant] in this search."

overreached in obtaining Alice and Beth's consent to the contracts. She found that appellant "engaged in unconscionable conduct in securing his contracts * * *, and the price term is exorbitant in relation to the value of his services" (June 10, 1992, Order at 10). This decision was primarily based on the Judge's analysis of Sparne v. Altshuler, 90 A.2d 919 (R.I. 1952); Kaplan v. Suher, 150 N.E. 9 (Mass. 1926); and Shepard v. Dick, 203 Kan. 164, 453 P.2d 134 (1969), and her resulting conclusion that appellant had taken advantage of the women, neither of whom had graduated from high school or had business experience, in presenting his contract offer on a "take it or leave it" basis.

Appellant's arrangement with Jessie's attorney provided for payment in two ways. In outline, if appellant found inconclusive evidence of death or adoption, he would be paid \$45 per hour for time devoted to the search. If he found conclusive evidence of death or adoption, he would receive 5 percent of the amount Jessie received, payable out of the contingency fee received by her attorney. If, however, appellant actually located Alice and/or Beth, he would receive no compensation from Jessie. In this event, he would be compensated only if he could contract directly with Alice and/or Beth. Appellant thus undertook an assignment that was highly speculative both as to the possibility of success and as to his being paid. He stood to lose a great deal if, after locating Alice and/or Beth, he could not get them to sign contracts.

Alice and her husband, Gilbert, testified that appellant appeared at their home and informed them that one of them had inherited a great deal of money. They stated that appellant refused to tell them which of them had inherited the money or any specifics of the matter until they had signed the contract. Alice indicated that they spent approximately 2 hours with appellant, and Gilbert stated that they went to dinner with him while they waited for a notary, before they signed the contract. Alice testified that appellant told them that if he gave them the information before they signed the contract, they could go directly to the proper place and he would not get paid. She further testified that appellant told her "that if we went down and I signed it and he told me who it was and then if I didn't believe him then he could just drop it from there. If I still had my doubts after he told me who it was, you know that had left the money, he would just leave" (Nov. 14, 1991, Hearing Transcript at 20-21). Gilbert indicated that he understood appellant's position. Both Alice and Gilbert testified that appellant gave them all of the information he had after they signed the contract.

Beth testified that Alice called her and told her everything about the inheritance. She was expecting appellant when he arrived at her home, apparently two days after Alice called. Although she already knew all of the necessary information, Beth signed the contract. At the hearing, she testified that she considered the contract established a "finders fee for him finding us." Id. at 28.

Addressing the conduct issue first, the Board finds that appellant's conduct, including his refusal to give Alice any information until she

signed the contract, was not unusual for the type of investigation in which he was engaged. There are several areas in which appellant's conduct can either be compared to, or distinguished from, reported cases involving heir hunters seeking specific performance of finder's fee contracts. In appellant's favor, the Board notes that: (1) appellant gave Alice at least a limited opportunity to repudiate her contract. Although appellant did not use a written acknowledgment that was signed after Alice received the information and arguably led Alice to believe that she could repudiate only if she did not believe him, Alice testified to the fact that appellant gave her an opportunity to repudiate; (2) Beth already had full information concerning the inheritance, but signed the contract anyway, stating that she considered it a finder's fee; (3) although neither woman finished high school, in their testimony both appeared to be competent individuals, who understood the situation in which they unexpectedly found themselves, and responded to it; and (4) neither Alice nor Beth objected to payment under the contracts at the hearing, even though at that time they had both had an opportunity to obtain outside advice.

In the Board's opinion, the conduct most damaging to appellant's claim was his sudden appearance at Alice's home, and apparent pressure to sign the contract without delay. There was no testimony indicating that appellant gave Alice an opportunity to consult with anyone other than Gilbert, that Alice and Gilbert had time during which they could discuss the matter without appellant being present, or that appellant gave them any choice other than to sign the contracts immediately or lose the opportunity altogether. It seems unlikely that this pressure was either accidental or inadvertent.

In distinction to the situation with Alice, Beth was thoroughly prepared for appellant's arrival, and had the opportunity to consult with anyone she chose before speaking with appellant.

Based on its examination of the totality of the situation, the Board believes that appellant's conduct, although bordering on being oppressive as to Alice, did not rise to the level of being unconscionable. Under the circumstances of this case, the Board does not believe that a court would refuse to grant specific performance of the contracts based upon appellant's conduct.

The Judge also found that the price term was exorbitant in relation to the services appellant provided to Alice and Beth. She held that "the consideration need not be the full equivalent value, but may be considered inadequate 'only when it is so disproportionate to value as to offend the normal sense of fair dealing which should characterize business transactions.' Shepard, supra at 138."

As mentioned above, the Judge found that appellant's investigation was conducted professionally and skillfully. It appears that she determined the contract fee was exorbitant in relation to what appellant would have been paid on an hourly basis for his services. Indeed, there is a wide discrepancy between the two amounts. However, that discrepancy is

inherent in almost every contingency fee arrangement, the essence of which is that the person performing the services assumes the risk that his or her efforts will not be successful, and therefore he or she will receive no compensation whatsoever. The Board has approved contingency fee attorney contracts. See, e.g., Dagg, supra. The basic difference between an attorney's contingency fee contract and a finder's fee contract is that in the former the client knowingly contracts for services to be performed in the future, while in the latter, the services have already been performed by the time the "client" is asked to contract. The Board believes that this difference justifies even harder scrutiny of "finder's fee" contracts than of attorney fee contracts.

Appellant undertook to find information concerning two individuals who had not been heard from in approximately 30 years. An unsuccessful investigation by another firm had apparently been abandoned. Although it is at least arguable that appellant had no competition in his search, this fact did not make the search easier. Appellant had very little information from which to work, and much of that information was no longer valid. As the Board stated in Dagg, 12 IBIA at 136, 91 I.D. at 42, appellant "took an apparently hopeless case and brought it to a successful conclusion." Although appellant was unquestionably motivated by self-interest, his efforts resulted in Alice and Beth receiving substantial inheritances of which they were totally ignorant. The inquiry is whether, in furthering his self-interest, appellant extracted an exorbitant fee from Alice and Beth.

Although there appears to be little likelihood that appellant realized his contracts required Departmental approval, it is undeniable that he could have put a higher percentage rate in the contracts with the reasonable belief that at least Alice would still have signed. In fact, he could have put a high rate in Alice's contract in the expectation that Beth was dead, or, if she were alive, would not contract with him once he had given Alice his information. He did not do this. Instead he sought a relatively low percentage.

Considering the facts noted above, the time required to locate Alice, the complexity of the search, and the size of the interests Alice and Beth received, the Board believes that a court would not find appellant's 15 percent contingency fee to be exorbitant. Accordingly, the Board believes that a court would not refuse to order specific performance of the contracts.

The finding that a court would probably order specific performance does not, however, conclude the Board's inquiry. It must still decide whether a trustee would be justified in refusing to approve the transactions based on a higher fiduciary standard. The percentage rate, appellant's conduct as to Alice, and appellant's conduct as to Beth, must each be reviewed under fiduciary standards. In the Board's opinion, the percentage rate and appellant's conduct as to Beth present no additional problem with which a trustee should be concerned.

However, appellant's failure to give Alice and Gilbert an opportunity to discuss the matter either privately between themselves or with a disinterested person such as a friend, business associate, lawyer, or other person is a factor weighing against a trustee's approval of the contract with Alice. Other factors, however, suggest that the contract could be approved despite appellant's conduct, namely that Alice had time after signing the contract to seek advice concerning it, and could have objected to payment at the hearing. Alice did not object to either the contract or payment until after appellant filed this appeal.

Although the Board disapproves of appellant's failure to allow Alice an opportunity to discuss signing the contract privately with her husband and/or with a disinterested third person, and, under only slightly different circumstances might have refused to approve the contract with her, under the particular facts of this case, it concludes that a trustee might properly approve these contracts. Accordingly, the Board reverses the Judge's decision not to require payment under the contracts.

Alice raises several arguments which seek to prevent appellant from receiving any compensation. These arguments were not presented to the Judge. The Board has consistently held that it is not required to consider issues that were not raised below. See, e.g., Estate of Herbert Brant, Sr., 23 IBIA 97 (1992); Estate of Warren Lewis Lincoln, 19 IBIA 118 (1990). However, because of the circumstances of this case, the Board will address them briefly.

Alice contends that appellant was required to divulge that he was an agent of Jessie's attorney, and to inform her of his payment agreement with that attorney. The Board concludes that whatever agency status may have existed between appellant and Jessie and/or her attorney terminated either when Jessie's attorney told appellant to conclude his search or when appellant located Alice without finding any evidence that either woman was deceased or had been adopted. Accordingly, appellant was no longer an agent for anyone when he spoke with Alice, and owed her no fiduciary duty.

Alice also argues that, through the power of attorney, appellant illegally attempted to practice law in the Commonwealth of Pennsylvania. The power of attorney grants appellant "full power of attorney to act in [Alice's] name, to assist [her] in the collection of any funds and/or property due [her] with particular reference to a sum of about \$232,000.00 being held by a third party[ies] in my name and an additional sum of about \$80,000.00 representing my share of another account being held by a third party(ies)." The power of attorney authorizes appellant to assist Alice in collecting the money being held for her; it does not authorize him to practice law.

Finally, Alice argues that appellant illegally engaged in private investigative activities in the Commonwealth of Pennsylvania, where he is not licensed to perform such activities. Nothing in the record supports

Alice's assertion in this regard. Instead, the record shows that appellant conducted his investigation in the States of New Mexico and California, where he is licensed. When conducting investigations in other states, the record shows that he used investigators in those states. The only activity in which appellant engaged in Pennsylvania was entering into a contract with Alice. Alice has cited no Pennsylvania authorities for the proposition that entering into a contract under such circumstances constitutes conducting investigative activities for which a Pennsylvania license is required.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the June 10, 1992, decision of Administrative Law Judge Patricia McDonald is reversed. 8/

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge

8/ All arguments not specifically addressed were considered and rejected. All pending motions are denied.